APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1947	*	
	*	
BRIAN OLANDER,	*	
	*	
Appellant,	*	Appeal from the
	*	United States District
vs.	*	Court for the District
	*	of North Dakota
STATE FARM MUTUAL	*	
AUTOMOBILE INSURANCE	*	
COMPANY, ET AL.,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is granted. The panel's opinion and the court's judgment of January 25, 2002, are vacated.

This case will be set for oral argument before the court en banc in St. Louis, Missouri, during the September 2002 court week.

Judge Bye took no part in this decision in this matter. (5369-010199)

March 26, 2002

Order Entered at the Direction of the Court
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1947

BRIAN OLANDER, Plaintiff - Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al., Defendants - Appellees.	*	Appeal from the United States District Court for the District of North Dakota.

Submitted: September 11, 2002

Filed: January 21, 2003

Before HANSEN, Chief Judge, LAY, HEANEY, McMILLIAN, BOWMAN, WOLLMAN, LOKEN, MORRIS SHEPPARD ARNOLD, MURPHY, RILEY, MELLOY, and SMITH, Circuit Judges, en banc.

LOKEN, Circuit Judge,

Brian Olander became a State Farm insurance agent in Mandan, North Dakota in 1981. In August 1966, Olander was charged with murder after a violent altercation with a neighboring landowner. When Olander refused to take a leave of absence until the criminal charges were resolved, State Farm terminated his agency agreement and assigned other agents to serve the State Farm policyholders previously served by Olander's agency. In 1999, Olander commenced this diversity action against State Farm, alleging wrongful termination of the agency agreement and related claims. The district court[1] granted State Farm's motion for summary judgment, concluding that Section III.A. of the written State Farm Agent's Agreement unambiguously made the parties' contractual relationship terminable at will. Section III.A. provides:

> This Agreement will terminate upon your death. You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address. The date of termination shall be the date specified in the notice, but in the event no date is specified, the date of termination shall be the date of delivery if the notice is delivered, or the date of the postmark, if the notice is mailed. Either party can accelerate the date of termination specified by the other by giving written notice of termination in accordance with this paragraph.

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[1] The HONORABLE RODNEY S. WEBB, Chief Judge of the United States District Court for the District of North Dakota, adopting the Report and Recommendation of the HONORABLE DWIGHT C. H. KAUTZMANN, United States Magistrate Judge for the District of North Dakota.

On appeal, a divided panel of this court reversed. The panel concluded that two other provisions of the Agreement create an ambiguity as to whether it was terminable only for cause; therefore, summary judgment was inappropriate because extrinsic evidence is admissible to construe this essential contract term. Olander v. State Farm Mut. Auto. Ins. Co., 278 F.3d 794, 798-99 (8th Cir. 2002). Because this decision may affect countless State Farm agency relationships in the Eighth Circuit and nationwide and conflicts with a number of decisions by other courts construing the standard form State Farm agency contract, we granted State Farm's petition for rehearing en banc and now affirm.

The issue on appeal may be quickly summarized. If the Agreement was terminable at will by either party, then Olander has no wrongful termination claim, and his related claims were properly dismissed as well. Under North Dakota law, the construction of a written contract is initially a question of law. Olander argues that extrinsic evidence -- most of it pre-dating his State Farm Agents Agreement -- establishes State Farm's intent that its agents be terminated only for cause. Under North Dakota law, such evidence is not admissible to vary the terms of an unambiguous written contract. "However, if a written contract is ambiguous, extrinsic evidence may be considered to show the parties' intent." Des Lacs Valley Land Corp. v. Herzig, 621 N.W.2d 860, 863 (N.D. 2001). "A contract is ambiguous when rational arguments can be made for different positions about is meaning.... When a contract is ambiguous, the terms of the contract and the parties' intent become questions of fact." Kaler v. Kraemer, 603 N.W.2d 698, 702 (N.D. 1999) (citations omitted). Here, the district court concluded the contract is unambiguous and refused to consider Olander's extrinsic evidence. Our panel disagreed. Whether a written contract is ambiguous must be determined from the four corners of the document, construing the contract as a whole. See Burk v. Nance Petroleum Corp., 10 F.3d 539, 542 (8th Cir.

1993) (applying North Dakota law). Ambiguity is a question of law that we review de novo, just as we review the grant of summary judgment de novo. Kaler, 603 N.W.2d at 702.

Section III of the State Farm Agent's Agreement is entitled "Termination of Agreement." Other than providing that the Agreement terminates upon the death of the agent (which confirms this is a personal services contract), Section III does not specify the *grounds* for termination. It simply provides, "You [the agent] or State Farm have the right to terminate this Agreement by written notice delivered to the other." In many cases, a contract's silence on an issue creates an ambiguity. But in this case, the contract's silence is itself unambiguous. The general rule in this country has long been that a personal services contract of indefinite duration may be terminated at will by either party. See Willcox & Gibbs Co. v. Ewing, 141 U.S. 627, 635-36 (1891):1 RICHARD LORD, WILLISTON ON CONTRACTS § 4.20 (4th ed. 1990). We have applied this general rule in many cases, including Martin v. Equitable Life Assurance Soc'y of U.S., 553 F.2d 573, 574-75 (8th Cir. 1977), where we held that an insurance agency contract having no fixed term was unambiguously terminable at will under South Dakota law.[2] Likewise, a leading insurance treatise states as the general rule for insurance agency contracts: "If the agency contract fixes no time for its duration, as a general rule, the agency contract may be terminated at any time

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[2] Other cases in which we have applied the general rule include Crowell v. Campbell Soup Co., 264 F.3d 756, 761-62 (8th Cir. 2001); Friedman v. BRW, Inc., 40 F.3d 293, 296 (8th Cir. 1994); Engelstad v. Virginia Mun. Hosp., 718 F.2d 262, 266 (8th Cir. 1983); Percival v. Gen. Motors Corp., 539 F.2d 1126, 1129 (8th Cir. 1976); McGinnis Piano & Organ Co. v. Yahmaha Int'l Corp., 480 F.2d 474, 479-80 (8th Cir. 1973); Maple Island Farm, Inc. v Bitterling, 209 F.2d 867, 878 (8th Cir. 1954), cert. denied, 348 U.S. 882 (1954); Merideth v. John Deere Plow Co., 185 F.2d 481, 482 (8th Cir. 1950), cert. denied, 341 U.S. 936 (1951); Moore v. Sec. Trust & Life Ins. Co., 168 F. 496, 498-500 (8th Cir. 1909), cert. denied, 219 U.S. 583 (1910).

at the election of either party." 13 ERIC HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D §99.2, at 788-89 & n.25 (1999). Accord Kaldi v. Farmers Ins. Exch., 21 P.3d 16, 18, 20 (Nev. 2001); Patillo v. Equitable Life Assurance Soc'y of U.S., 502 N.W.2d 696, 699 (Mich. App.1992); James H. Washington Ins. Agency v. Nationwide Mut. Ins. Co., 643 N.E.2d 143, 147 (Ohio App. 1993).

North Dakota has codified this general rule for contracts of employment. See N.D. CENT. CODE § 34-03-01 The Supreme Court of North Dakota has also applied the rule to personal services contracts, under which agents and professionals who are not employees provide on-going services of indefinite duration. See N.Am. Pump Corp. v. Clay Equip. Corp., 199 N.W.2d 888, 894 (N.D. 1972) (exclusive agency agreement to sell equipment); Myra Found. v. Harvey, 100 N.W.2d 435, 437 (N.D. 1959) (bookkeeping services). That the Supreme Court of North Dakota would apply the general rule to Section III.A. of the State Farm Agent's Agreement is confirmed by Wadeson v. Am Family Mut. Ins. Co., 343 N.W.2d 367, 371 (N.D. 1984). In Wadeson, a contract between an insurer and its district manager provided, like Section III.A., that it "may be terminated by any party as to its interest by giving written notice to the other," without specifying the grounds for termination. The court held that the contract was terminable at will, not only for good cause.

Thus, the North Dakota general rule establishes that the Agreement's silence as to its duration is, without more, an unambiguous declaration that is terminable at will by either party. Seeking to avoid the general rule, Olander argues, and the panel majority agreed, that two other provisions of the Agreement create an ambiguity that requires the consideration of extrinsic evidence.

First, Section III.B. of the Agreement provides: "In the event [State Farm] terminate[s] this Agreement, you are entitled upon request to a review in accordance with the termination review procedures approved by the Board of Directors of [State Farm], as amended from time to time." The panel majority surmised that "one rational explanation for the existence of the review procedure is to ensure that any termination was made for good cause, and not capriciously." 278 F.3d at 798. However, two courts have squarely rejected the contention that this provision renders the State Farm Agent's Agreement ambiguous. See Mooney v. State Farm Ins. Cos., 344 F.Supp. 697, 699-700 (D.N.H. 1972); Ex parte Gardner, 822 So.2d 1211, 1219 (Ala. 2001). Another court construed a Farmers Insurance Exchange agency contract as unambiguously terminable at will despite a similar review provision:

> The review board process gives the agent the opportunity to assert that it is not in the best interest of Farmers to sever the agency relationship. It also gives the agent, in appropriate circumstances, a forum in which to argue that the termination was the product of bias or prejudice on the part of the person who made the initial decision to terminate the relationship.... Thus, even without a requirement of cause, the review board serves a viable purpose under the contract.

Kaldi, 21 P.3d at 21. Similarly, many other cases have held that an employer's contract termination procedure did not render an employment relationship terminable only for cause. See e.g., Taliento v. Portland W. Neighborhood Planning Council, 705 A.2d 696, 699 (Me. 1997); Suburban Hosp., Inc. v. Dwiggins, 596 A.2d 1069, 1076-77 (Md. 1991); Vancheri v. GNLV Corp., 777 P.2d 366, 369-70 (Nev. 1989).

Second, the panel majority relied upon the statement in the Agreement's preamble that the parties "expect that by entering into this Agreement, and by the full and faithful observance and performance of the obligations and responsibilities herein set forth, a mutually satisfactory relationship will be established and maintained." However, this hortatory language may not properly serve to create an ambiguity in an otherwise unambiguous termination provision. See Aramony v. United Way of Am., 254 F.3d 403, 413 (2d Cir. 2001) (holding that recitals in a contract's preamble may be useful in interpreting ambiguous terms but "cannot create any right beyond those arising from the operative terms of the document"). When one operative term in a contract is unambiguous, as the termination provision is here, other provisions must be read so that they are consistent with the plain meaning of the unambiguous term, See Burk, 10 F.3d at 543-44.

To our knowledge, every court but one has interpreted the State Farm Agent's Agreement as being unambiguously terminable at will. See Mooney, 344 F.Supp. 697; Gardner, 822 So.2d 1211; Melnick v. State Farm Mut. Auto. Ins. Co., 749 P.2d 1105, 1110-11 (N.M. cert. denied, 488 U.S. 822 (1988); Vitkauskas v. State Farm Mut. Auto Ins. Co., 509 N.E.2d 1385, 1387 (Ill. App. 1987). The one exception is the Ninth Circuit's unpublished opinion in Sandberg v. State Farm Mut. Auto. Ins. Co., No 97-55971, 1999 WL 369805 (9th Cir. 1999), cert. denied, 528 U.S. 1118 (2000). However, in holding that summary judgment was inappropriate on the terminable-at-will issue, the court in Sandberg applied California law, which, unlike North Dakota law, permits the consideration of extrinsic evidence on the question of whether a contract is ambiguous.

Moreover, the court in Sandberg affirmed the grant of summary judgment in State Farm's favor. Applying the definition of good cause under California law -- "a fair and

honest reason, regulated by good faith, that is not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual"-- the court concluded that State Farm had good cause to terminate an agent who had sued State Farm seeking punitive damages for fraud. 1991 WL 369805, at *2. Here, Olander was terminated after he was indicted for murder and refused to take a leave of absence until the criminal proceedings were resolved. Thereafter, a jury convicted him of manslaughter, and he spent many months in prison before the Supreme Court of North Dakota reversed his conviction. Though he was ultimately acquitted after a second trial, State Farm's summary judgment motion was supported by an affidavit from the Director of Agent Licensing and Investigations for the North Dakota Insurance Department averring that, had Olander not lost his agent's license when he was terminated by State Farm, "at the time of his conviction of a felony, the Department would have taken action in some form to suspend and/or possibly revoke his license." These events make it clear that, if the definition of good cause under California law applied in this case (which of course it does not), State Farm would be entitled to summary judgment on the ground that it had good cause to protect its business interests by terminating Olander in August 1996.

Because the State Farm Agent's Agreement was unambiguously terminable at will as a matter of law, the district court properly declined to consider the extrinsic evidence submitted by Olander in granting State Farm's motion for summary judgment. Accordingly, the judgment of the district court is affirmed.

LAY, Circuit Judge, dissenting, with whom HEANEY and McMILLIAN, Circuit Judges, join.

I join in Judge HEANEY's dissent.

This controversy, rooted in diversity jurisdiction, involves the question of whether a contract is ambiguous under North Dakota law. Requiring a routine diversity case such as this to be reheard en banc violates the Federal Rules of Appellate procedure and the longstanding policy of this court.

The Federal Rules of Appellate Procedure state that an en banc "hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). The Internal Operating Procedures of the Eighth Circuit elaborate:

> The issue of whether a case should be reheard en banc is separate and distinct from the issue of whether the case should be reheard by the panel. A panel may rehear a case en banc if it questions whether its decision was correct. The court may rehear a case en banc if the case "is of such significance to the full court that it deserves the attention of the full court."

United States Court of Appeals for the Eighth Circuit, Internal Operating Procedures IV.D. (Quoting Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 262-63 (1953)).

The first en banc decision I sat on after appointment to this court in 1966 related to a death sentence under federal law. See Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (en banc). Since that time, this court has averaged approximately six to ten en banc hearings a year. My research shows there have been eight en banc cases in a period of thirty–six years where diversity of citizenship constituted the jurisdictional root for the case to be in federal court. None of those cases, however, were voted to be heard by the full court simply

because of the doubtful application of state law. These cases were heard en banc because they involved significant questions of federal procedure or federal constitutional law. I am unaware of any en banc case from this or any other circuit where the narrow issue presented was the alleged ambiguity of a contract under state law. For example, in Lehman Bros. Kuhn Loeb Inc. v. Clark Oil and Refining Corp., 739 F.2d 1313 (8th Circuit 1984) (en banc), the legal merits turned on the construction of a contract, but the case was placed en banc because of a dispute over the constitutionality of the portion of the Federal Magistrate Act providing for trial before the magistrate judge with the consent of the parties. Id. at 1314.

When scheduling a case to be heard en banc in any federal court of appeals, one must consider the limited resources of that court in terms of whether the issue itself is so significant that it should require the time of all of the active and participating senior judges involved. Allowing this case to proceed en banc invites every lawyer in every routine appellate case in this circuit to petition for rehearing en banc without a thought as to the significance of the issue involved or the limited resources of the court. Albeit, the court does not have to grant any petition, but the court must read every petition filed.

Many of our sister circuits have deemed questions of state law to be so inconsequential that they have, by rule, established that such a case cannot be reheard en banc.[3] For example, the rule in the Eleventh Circuit reads:

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[3] Several of our sister circuits include similar admonitions in their local rules and internal operating procedures. See United States Court of Appeals for the Third Circuit, Local Appellate Rule 35.4; United States Court of Appeals for the Fifth Circuit, Rule 35.1; United States Court of Appeals for the Tenth Circuit, Rule 35.2

> Alleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence, or error asserted in the panel's misapplication of correct precedent to the facts of the case), are matters for rehearing before the panel but not for en banc consideration.

United States Court of Appeals for the Eleventh Circuit, Rule 35-3; accord United States Court of Appeals for the Sixth Circuit, Rule 35(c).[4] The Seventh Circuit has written:

> Further, and perhaps most revealing, the petition presents only issues of state law. As such petitioners had an added burden to explain why an issue of [state] law was of such exceptional importance that it warranted review en banc in a federal court, the decision of which would not even be binding on [that state's] courts. A purely state law issue would need to have national significance to warrant such review.

HM Holdings, Inc. v. Rankin, 72 F.3d 562, 563 (7th Cir. 1995). As an example of the type of case with such national significance, the court offers Todd v. Societe Bic., S.A., 21 F.3d 1402 (7th Cir. 1994) (en banc), and Todd v. Societe Bic., S.A., 9 F.3d 1216 (7th Cir. 1993) (en banc), which considered questions of Illinois law in the context of massive products liability litigation.

Here, as in HM Holdings, there is an utter lack of national significance to the state law issue presented. The decision will have limited significance even within the North Dakota since

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[4] In the Ninth Circuit, diversity cases are deemed non-precedential and seldom result in published opinions.

the state supreme court can correct any error in the panel's interpretation. In fact, it appears the only basis for the petition for rehearing en banc is that State Farm argues it will affect construction of its contracts on a nationwide basis. It has long been recognized that "[t]he function of en banc hearings is not to review alleged errors for the benefit of losing litigants." United States v. Rosciano, 499 F.2d 173, 174 (7th Cir. 1974); see also Western Pac., 345 U.S. at 262-63.

For this circuit to differ from all of our sister circuits, I respectfully submit, trivializes the federal judicial process. Throughout my tenure on the court, our judges have stressed the need to conserve judicial resources and to avoid en banc hearings whenever possible. Two senior judges with a combined tenure of seventy years on the court have found the contract was ambiguous. No judge is perfect and we may well be wrong, but that is no reason to place a case such as this before the en banc court. To do so violates the spirit, if not the letter, of the Federal Rules of Appellate Procedure and this court's longstanding policy.

If this court certified the narrow issue involved to the North Dakota Supreme Court, it would indeed be embarrassing, and the court would undoubtedly refuse to grant certification. Yet, such an effort to certify would be far more desirable than utilizing the limited resources of the full court of appeals to guess what the North Dakota Supreme Court would do. The merits of the case should not in any way control the voting of the active judges to place this case en banc. As a diversity case applying North Dakota law in a particularly fact-bound context, no other court in the country is bound by this decision, including the North Dakota Supreme Court. In addition, my limited research discloses that this is the first case in the United States to ever address en banc a routine question of whether a contract is ambiguous under state law. This fact alone

mandates reconsideration of our en banc order as being improvidently granted.

It has been said that this case is important because it is a ruling of this circuit and thus becomes the law of this circuit. Such an argument makes little sense. This argument misunderstands the basic principle of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Our ruling must follow the law of the state from which this case arises. It does not affect the law of any other state. The Supreme Court of North Dakota may well change our ruling tomorrow.

Since this case has such little precedential or national significance, the court should not have heard the case en banc. For these reasons, I respectfully dissent.

HEANY, Circuit Judge, dissenting, with whom LAY and MCMILLIAN, Circuit Judges, join.

In reviewing a diversity case en banc, our only responsibility is to decide the case according to the laws of the relevant state, in this case, North Dakota. It is not, as the majority suggests, our task to determine whether State Farm Insurance Company can terminate agents' contracts in any state without cause, any more than it is our duty to protect the agents who have spent years building a successful agency for themselves, only to have their life's work taken away from them without cause. National uniformity is not and never has been a goal of federal courts in interpreting contacts in diversity cases. We remain convinced that the original panel decided the matter correctly, and that the district court erred by granting summary judgment to State Farm and denying Brian Olander's motion to set aside the judgment pursuant to Fed. R. Civ. P. 60(b). We therefore dissent.

Background

We summarize the history of this case to highlight aspects of the matter that the majority did not address. In 1979 Brian Olander became a trainee agent for State Farm and entered into an agent's agreement in 1981. By the terms of the agreement, Olander was an independent contractor authorized to represent State Farm in Mandan, North Dakota. For seventeen years he was very successful. By 1996, he had secured over 5,000 active policyholders, and his take-home commissions were approximately $200,000 year. In all his years with State Farm, Olander delivered exemplary service to his customers and provided large profits and fierce loyalty to State Farm. He received no adverse ratings from State Farm.

On August 16, 1996, Olander was arrested for homicide after an altercation with his neighbor. Thereafter, State Farm offered Olander an unpaid leave of absence with the following conditions:

> State Farm would service the business assigned to your account, and you would receive no compensation during the term of the leave of absence. State Farm would service the business from a company facility, and you would remove all signs from your current office which identify State Farm.
>
> You would not identify yourself as a State Farm Agent, nor would you contact any State Farm policyholders in regard to insurance....
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> ....
>
> If you are interested in such a leave of absence arrangement, which we would anticipate would continue no longer than the resolution of the criminal prosecution pending against you, but which could be

> terminated by either of us at any time (thus terminating your Agent's Agreement), please let me or Lou Santoro know by August 30, 1996, and we will prepare an appropriate amendment to your Agent's Agreement.
>
> ..... If I have not heard from you by August 30, we will take steps to terminate your Agent's Agreement effective August 31, 1996.

(J.A. at 69 (emphasis added)). Olander refused to accept the proposal, and State Farm terminated the agent's agreement. It subsequently seized Olander's business records, computers, and other policy information, and his policies were assigned to other agencies in the area.

Olander's murder trial commenced in April 1997. The jury returned a verdict, finding Olander guilty of manslaughter and acquitting him of murder. In March 1998, the North Dakota Supreme Court reversed Olander's conviction because of instructional error on the issue of self defense. He was tried a second time and acquitted of all charges. By this time, however, he had lost his valuable agent's agreement, and without an insurance company sponsor, he could not be licensed as an insurance agent.

In 1999, Olander instituted an action against State Farm alleging that: (1) the termination of his agent's agreement constituted a breach of contract; (2) State Farm tortiously interfered with the business relationship he developed with his clients; and (3) State Farm was unjustly enriched by his termination. State Farm promptly filed a motion for summary judgment, which was granted by the magistrate on February 7, 2001. Thereafter, the district court adopted the magistrate's report. Olander then filed a motion to set aside the judgment pursuant to Fed. R. Civ. P. 60(b) based on newly discovered evidence and failure to make disclosure required by discovery.

The district court denied both motions, and Olander appeals the district court's summary judgment ruling on his breach of contract claim and its denial of his 60(b) motion.

Discussion

The majority holds that the independent agent's agreement was terminable at will by State Farm with or without cause. We disagree with that conclusion because the majority ignores North Dakota law, which requires that any ambiguity in a written agreement be resolved by considering the four corners of the agreement. The majority looks only at the termination clause and disregards the preamble and a contract provision that provides for a review following termination.

The North Dakota Supreme Court has given a succinct summary of the law relating to the interpretation of written agreements:

> The construction of a written contract to determine its legal effect is generally a question of law. Pamida, Inc. v. Meide, 526 N.W.2d 487, 490 (N.D. 1995). A court must interpret a contract to give effect to the mutual intention of the parties as it existed at the time of contracting. N.D.C.C. § 9-07-03; Pamida, at 490. In interpreting a written contract, a court should ascertain the intention of the parties from the writing alone if possible. N.D.C.C. § 9-07-04; Pamida, at 490. A written agreement supersedes any prior oral agreements or negotiations between the parties in the absence of any ambiguity. Norwest Bank North Dakota, Nat'l Ass'n v. Christianson, 494 N.W.2d 165, 168 (N.D. 1992).

> A contract is ambiguous when rationale arguments can be made for different positions about its meaning. Felco, Inc. v. Doug's North Hill Bottle Shop, Inc., 1998 N.D. 111, P12, 579 N.W.2d 576. Whether or not a contract is ambiguous is a question of law. Moen v. Meidinger, 547 N.W.2d 544, 547 (N.D. 1996). Determining an ambiguity exists is merely the starting point in a search for the parties' intent because an ambiguity creates questions of fact to be resolved using extrinsic evidence. Id. When a contract is ambiguous, the terms of the contract and parties' intent become questions of fact. Watcher Development, L.L.C. v. Gomek, 544 N.W.2d 127, 131 (N.D. 1996).

Kaler v. Kraemer, 603 N.W.2d 698, 702 (N.D. 1999).

The North Dakota Century Code instructs that when interpreting a contract, "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D.C.C. § 9-07-06. It is also well settled under North Dakota law that [t]he intention of the parties to a contract must be gathered from the entire instrument, not from isolated clauses, and to every clause, sentence, and provision should be given effect consistent with the main purpose of the contract." Nat'l Bank of Harvey v. Int'l Harvester Co., 421 N.W.2d 799, 802 (N.D. 1988).

State Farm has persuaded the majority to rely upon the following language within the insurance agreement to assert that the contract is unambiguous in instructing that the agency relationship with Olander was at all times terminable at will:

> A. This agreement will terminate upon your death. You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address. The date of termination shall be the date specified in the notice, but in the event no date is specified, the date of termination shall be the date of delivery if the notice is delivered, or the date of the postmark, if the notice is mailed. Either party can accelerate the date of termination specified by the other by giving written notice of termination in accordance with this paragraph.

This section, on its face, sets forth the procedure by which the parties to the agreement must give notice of termination. It says nothing about whether the termination must be for cause or may be at will. Certainly, rational arguments can be made for different positions about its meaning. North Dakota's parol evidence rule recognizes this reality by allowing "proof of the existence of any separate oral stipulations or agreements as to matters on which a written contract is silent." Schue v. Jacoby, 162 N.W.2d 377, 382 (N.D. 1968); see also Putman v. Dickinson, 142 N.W.2d 111, 119 (N.D. 1966).

Initially, paragraph B of section III, which immediately follows the provision at issue, entitles the agent to a review following termination of the agreement by State Farm.[5] While

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[5] The provision reads:

> B. In the event we terminate this Agreement, you are entitled upon request to a review in accordance with the termination review procedures approved by the Board of Directors of the Companies, as amended from time to

(continued...)

by no means foreclosing other interpretations, one rational explanation for the existence of the review procedure is to ensure that any termination was made for good cause, and not capriciously. Cf. Kaldi, 21 P.3d at 21 (finding the review procedure offers "the agent the opportunity to assert it is not in the company's best interest of the insurer to sever the agency relationship...."). In addition, the preamble to the contract lends further support to the plaintiff's argument. See United States v. Tilley, 124 F.2d 85, 854 (8th Cir. 1941). Among a number of other provisions, it states: "The Companies and the Agent expect that by entering into this Agreement, and by the full and faithful observance and performance of the obligations and responsibilities herein set forth, a mutually satisfactory relationship will be established and maintained." Id. (emphasis added.) This language is far from dispositive. It is, however, additional textual support for plaintiff's argument located within the four corners of the document. It suggests that if the parties meet their contractual obligations, the relationship will continue. Such an interpretation is inconsistent with State Farm's assertion that the agreement unambiguously allows for termination regardless of the parties' performance[6].

(...continued)

time.

[6] In 1966, State Farm amended its agent's agreement to delete from the termination clause in effect at that time the words, "with or without cause." The reasons for this change were set forth by Henry Keller, Jr., the agency vice president for state [sic] Farm at the time the decision to revise the termination clause was made. In the detailed affidavit, Keller swore under oath as follows:

> 13. In order to obtain the agent prospective on issues which need to be addressed in the new contract, we set up a program to obtain information from the agents. This informational program revealed a major concern [on] the part of the agents that the

(continued...)

The majority cites three cases for the proposition that the Supreme Court of North Dakota would apply the North Dakota Code provision relating to personal services to insurance contracts and permit insurance agency contracts to be terminable at will. We are not persuaded that these cases support the view that the North Dakota Supreme Court would accept the majority's view in this case.

In Myra Foundation v. Harvey, 100 N.W.2d 435 (N.D. 1959), the North Dakota Supreme Court held that an agreement

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(...continued)

> company might terminate them arbitrarily or capriciously, without good reason. If that were to occur, then the agents' entire investment in his agency would be lost. We determined that we needed to address that concern, in order to assure that agents would be willing to make the substantial investment in time, effort and money contemplated by our independent contractor/career agent approach.
>
> 14. We took steps in the AA 660 contract to address that concern. First, we removed the words "with or without cause" from the termination review provision, which would entitle any agent whose agreement had been terminated by the company to a review of the decision...
>
> 15. We considered adding provisions which would specify the reasons for which termination would occur, but...opted for the approach...which gave agents the protection of a due cause contract, but with more flexibility in defining the cause.
>
> 16. The removal of the words: "with or without cause" from the termination provision was a necessary part of this exercise. We knew that it would be neither logical nor consistent to keep a provision stating that we could terminate "with or without cause" right above a termination review provision to guard against arbitrary and capricious terminations.

(J.A. at 714-15.)

to provide bookkeeping services had been formed by the parties through an exchange of letters. The plaintiff brought an action to recover possession of certain books and records that it alleged had been unlawfully detained by the defendant. The defendant answered that he had legal possession of the books and records by virtue of a lien for services performed for the plaintiff and counterclaimed for the reasonable value of services. The case was tried, and the defendant obtained a judgment on his counterclaim. Plaintiff moved for judgment notwithstanding the verdict or for a new trial. The motion was denied and the plaintiff appealed. The North Dakota Supreme Court remanded the case on a damage issue and simply noted "that the contract, neither expressly not impliedly, fixes any time for its duration. Either party might therefore terminate the contract upon giving reasonable notice to the other." Id. at 437. No argument was made by either party on this issue, and the only citation by the North Dakota Supreme Court was to 17 C.J.S. Contacts § 398 and 12 Am. Jur. (Contracts, Sec. 305) 860.

In North American Pump Corp. v. Clay Equipment Corp., 199 N.W.2d 888 (N.D. 1972), the plaintiff, a sales and service corporation engaged in selling farm equipment, asserted that an oral contract with the defendant, a manufacturer, gave it the exclusive right to sell the defendant's products within the northern half of North Dakota and a small area in Northwestern Minnesota. The jury returned a verdict for the plaintiff in the sum of $3,000. The North Dakota Supreme Court affirmed the judgment after eliminating interest on the amount prior to the verdict. The only reference by the North Dakota Supreme Court to the issues facing us, "the agreement could have been terminated by either party on reasonable notice [and thus] ... the agreement was not within the statue of frauds, even though it was not terminated within one year of its commencement." Id. at 894.

In Wadeson v. American Family Mutual Insurance Co., 343 N.W.2d 367 (N.D. 1984), the plaintiff brought an action against American Family, alleging his agency had been terminated without cause. There was no indication in the case that there was a written agreement between the parties and certainly no indication that the agreement contained any provisions similar to those contained in the instant case. The North Dakota Supreme Court referred to the North Dakota Code, stating: "An employment having no specified term may be terminated at the will of either party on notice to the other...." Id. at 369.

State Farm contends that North Dakota law prohibits the use of parol evidence to vary the terms of a written contract where, as here, the parties agree that the contract contains the entire agreement. This argument is without merit. Putnam v. Dickinson held parol evidence was admissible where a deed was silent on a matter. The court indicated the parties did not intend the agreement "to be a complete and final statement of the whole of the transaction between them," and the extrinsic evidence was consistent with the terms of the agreement. Putnam, 142 N.W.2d at 119. However, the North Dakota Supreme Court has never held this to be the only circumstance where parol evidence is admissible in a contract dispute. For instance, in Jorgensen v. Crow, 466 N.W.2d 120 (N.D. 1991), the state supreme court held the trial court had erred in admitting parol evidence "that varied the purchases price of the contract for deed." Id. at 124. However, it found no error in the trial court's admitting "a prior oral agreement that the yearly payment due under the contract for deed would be satisfied by one season's use of the pasture because that testimony does not contradict a term of the written contract." Id. The court has explicitly stated that, when an ambiguity exists, "parol evidence is admissible to explain existing essential terms or to show the parties' intent." Bye v. Elvick, 336 N.W.2d 106, 111 (N.D. 1983). That is the situation we are presented with here.

Whether or not the agent's agreement expressed the entire transaction between State Farm and Olander is of no consequence.

In the instant case, we are presented with a contractual provision that is silent on the subject of cause. Both parties offer plausible explanations for this silence and Olander has directed us to provisions within the agreement itself supporting his interpretation. Therefore, reasonable persons could rationally argue that the termination provision merely sets forth the procedure for giving notice of termination without specifying whether or not termination requires cause. "Because reasonable people could make rational arguments in support of contrary positions...there was a genuine issue of material fact rendering summary judgment on this issue inappropriate." Pamida, Inc. v. Meide, 526 N.W.2d 487, 493 (N.D. 1995). In light of this conclusion, it is unnecessary to address Olander's claims regarding his Rule 60(b) motion.

Because it is well settled under North Dakota law that the entire contractual instrument, inclusive of all clauses and provisions, must be considered to determine the intention of the parties, we would remand this matter to the district court for a trial on the merits.

A true copy.

Attest,

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

United States Statute

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28 U.S.C. §46

Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court en banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible

(1)

to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an en banc court reviewing a decision of a panel of which such judge was a member, or

(2)

to continue to participate in the decision of a case or controversy that was heard or reheard by the court en banc at a time when such judge was in regular active service.

APPENDIX D

Federal Rules of Civil Procedure

FRAP 35. EN BANC DETERMINATION

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

APPENDIX E

Local Rules for the United States Court of Appeals for the Third Circuit

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RULE 35.0. DETERMINATION OF CAUSES BY THE COURT *EN BANC*

35.1 Required Statement for Rehearing *En Banc*

Where the party suggesting rehearing *en banc* is represented by counsel, the suggestion shall contain, so far as is pertinent, the following statement of counsel:

> "I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decision of this court or the Supreme Court in [citing specifically the case or cases], OR, that this appeal involves a question of exceptional importance, *i.e.* [set forth in one sentence]."

***

35.4 Caution

As noted in FRAP 35, *en banc* hearing or rehearing of appeals is not favored. Counsel have a duty to the Court commensurate

with that owed their clients to read with attention and observe with restraint the Required Statement for Rehearing *en banc* set forth in 3rd Cir. LAR 35.1. Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the rigorous requirements of FRAP 35 and 3rd Cir. LAR 35.1.

IOP 9.3 CRITERIA FOR REHEARING *EN BANC*

9.3.1 This court strictly follows the precept of Fed.R.App.P. 35(a) and Local Appellate Rule 35.4 that rehearing *en banc* is not favored and will not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance.

9.3.2 This court does not ordinarily grant rehearing *en banc* when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

9.3.3 Rehearing *en banc* is ordinarily not granted when the only issue presented is one of state law.

APPENDIX F

Local Rules for the United States Court of Appeals for the Fifth Circuit

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RULE 35. *EN BANC* DETERMINATION

35.1 Caution. Counsel are reminded that in every case the duty of counsel is fully discharged without filing a petition for rehearing *en banc* unless the case meets the rigid standards of FRAP 35(a). As is noted in FRAP 35, *en banc* hearing or rehearing is not favored. Among the reasons is that each request for *en banc* consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of FRAP 35(b)(1). The court takes the view that, given the extraordinary nature of petitions for *en banc* consideration, it is fully justified in imposing sanctions on its own initiative under, *inter alia*, FRAP 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of the procedure.

I.O.P. Petition for Rehearing En Banc

Extraordinary Nature of Petitions for Rehearing En Banc – A petition for rehearing en banc is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior supreme court, fifth circuit or state law precedent, subject to the following: alleged errors in the facts of the case (including sufficiency of the evidence) or in the application of correct precedent to the facts of the case are

generally matters for the panel rehearing but not for rehearing en banc.

APPENDIX G

Local Rules for the United States Court of Appeals fr the Sixth Circuit

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RULE 35 DETERMINATION OF CAUSES BY THE COURT *EN BANC* – REQUIRED STATEMENT – HOW REQUESTED – WHEN CONSIDERED

(a) *Suggestion for Rehearing En Banc.* A suggestion for a hearing or rehearing *en banc* may be made as provided in FRAP 35 or by any member of the *en banc* Court. The effect of the granting of a rehearing *en banc* shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal. Any petition for rehearing containing a suggestion for rehearing *en banc* shall so state plainly on the cover and in the title to the document. A suggestion for rehearing *en banc* will also be treated as a petition for rehearing before the original panel. Twenty-five copies shall be filed. A copy of the opinion or final order sought to be reviewed shall accompany each of the 25 copies of the suggestion for *en banc* review. This Court ordinarily will not consider any such suggestion which fails to conform to this rule.

(b) *Counsel Not Obligated to File. En banc* consideration of a case is an extraordinary measure, and in every case the duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the rigid standards of FRAP 35(a). The filing of a petition for rehearing, with or without a suggestion for rehearing *en banc*, is not a prerequisite to the filing of a petition for writ of *certiorari*.

(c) *Extraordinary Nature of Suggestion for Rehearing En Banc.* A suggestion for rehearing *en banc* is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Sixth Circuit precedent. Alleged errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing *en banc*.

APPENDIX H

Local Rules for the United States Court of Appeal for the Ninth Circuit

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RULE 35-1. PETITION FOR REHEARING EN BANC

Where a petition for a rehearing *en banc* is made pursuant to FRAP 35(b) as part of a petition for rehearing, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the petition.

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing *en banc*.

APPENDIX I

Local Rules for the United States Court of Appeals for the Tenth Circuit

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RULE 35. *EN BANC* DETERMINATION

RULE 35.1. *EN BANC* CONSIDERATION

(A) Extraordinary Procedure.

A request for *en banc* consideration is disfavored. *En banc* review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court.

APPENDIX J

Local Rules for the United States Court of Appeals for the Eleventh Circuit

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RULE 35-3. EXTRAORDINARY NATURE OF PETITIONS FOR *EN BANC* CONSIDERATION

A petition for *en banc* consideration, whether upon initial hearing or rehearing, is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional importance in an appeal or other proceeding, and, with specific reference to a petition for *en banc* consideration upon rehearing, is intended to bring to the attention of the entire court a panel opinion that is allegedly in direct conflict with precedent of the Supreme Court or of this circuit. Alleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for *en banc* consideration.

Counsel are reminded that the duty of counsel is fully discharged without filing a petition for rehearing *en banc* if the rigid standards of FRAP 35(a) are not met, and that the filing of a petition for rehearing or rehearing *en banc* is not a prerequisite to filing a petition for writ of certiorari.

APPENDIX K

Case No. 01-1947

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIAN OLANDER,

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
OF NORTH DAKOTA, SOUTHWESTERN DIVISION

Honorable Rodney S. Webb, Judge

PETITION FOR PANEL REHEARING

PETITION FOR REHEARING EN BANC

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A. PETITION FOR PANEL REHEARING

Come now appellees, pursuant to Rule 40, F.R.A.P. and Eighth Circuit Rule 40A and move for panel rehearing for the reason that the Court overlooked or misapprehended the following matters of law and fact:

1. The Agent's Agreement specifies no duration and is of indefinite duration.

2. Under North Dakota law, an agreement for services with no definite duration is terminable at will by either party.

3. The parties agreed that the Agent's Agreement stated their entire agreement (Appellees' Add. 9 ¶ VI.E.), thus subject to N.D.C.C. §§ 9-07-02, -04.

4. The silence of the Agreement as to cause for termination does not render the Agreement ambiguous under North Dakota law.

5. Termination review is not an inquiry for good cause and inclusion of language concerning the right to review and the expectation of a satisfactory relationship do not render the Agreement ambiguous.

6. Each of the several reported decisions which has examined State Farm's Agent's Agreement has held that it is unambiguous.

7. The Court relied on (Slip Op. 8), but misapprehended, the decision in ***Kaldi v. Farmers Insurance Exchange***, 21 P.3d 16 (Nev. 2001), which actually establishes that State Farm's Agreement is unambiguous.

8. The Agreement (App. Add. 5-6) unambiguously gave each party the right to terminate at any time on notice.

9. There is no relevant parol evidence to consider. Plaintiffs admitted that no representative of State Farm had made any statement to him or representation about how or when the Agreement could be terminated. Olander Depo. 264-65 found at Jt.App. 189-90.

B. PETITION FOR REHEARING EN BANC

Comes now appellees pursuant to Rule 35, F.R.A.P. and move for rehearing en banc for the reason that:

1. The decision of the panel is contrary to decisions of this Court, specifically: ***Crowell v. Campbell Soup Co.***, 264 F.3d 756, 761 (8th Cir. 2001); ***Martin v. Equitable Life Assurance Society***, 553 F.2d 573 (8th Cir. 1977) and consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

2. The decision of this Court raises matters of exceptional importance in that:

(a) Appellees have contracts with hundreds of agents throughout this Circuit, all of which have language concerning termination similar to that at issue in this appeal. The parties need stability and predictability in their contractual relationships. The decision of the divided panel creates uncertainty and impairs the stability and predictability of those contractual relationships.

(b) The decision addresses fundamental aspects of the contract law of a Circuit State, and creates substantial

instability and unpredictability concerning the contract law of North Dakota and whether N.D.C.C. §§ 9-07-02 and -04 and the Parol Evidence Rule have as much vitality in this Court as in the Supreme Court of North Dakota.

(c) Many types of personal service agreements contain similar termination review clauses and arguably are now ambiguous and/or require cause to terminate in this Circuit.

C. ARGUMENT FOR PANEL REHEARING

Olander's Agent's Agreement contained a simple clause granting to each party *the right* to terminate: "You or State Farm have *the right* to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address." Appellees' Add. at 5 (emphasis added). It was not simply a notice provision; it granted the *right* to terminate.

Other State Farm Agreements with agents, including that language, have been uniformly construed in the reported cases to permit either party to terminate at will. ***Mooney v. State Farm Insurance Companies***, 344 F.Supp. 697 (D.N.H. 1972); ***Melnick v. State Farm Mutual Automobile Insurance Co.***, 749 P.2d 1105 (N.M. 1988), *cert denied*, 499 U.S. 822, 109 S.Ct. 67, 102 L.Ed.2d 44 (1988); ***Vitkauskas v. State Farm Mutual Automobile Insurance Co.***, 509 N.E.2d 1385 (Ill. App. 1987). The dissent cited similar cases. This Court overlooks those well-reasoned rulings.

The Agent's Agreement is silent as to duration. Under North Dakota law, it is thus an agreement of indefinite duration.

North American Pump Corp. v. Clay Equipment Corp., 199 S.W.2d 888, 894 (N.D. 1972) (cited in Appellees' Brief at 22).[1]

Under the law of North Dakota, an agreement for services of indefinite duration can be terminated at will by either party:

> This Court has held that where parties enter into an agreement by the terms of which one party is to perform services for the other, and the contract neither expressly nor impliedly fixes the time of its duration, it may be terminated by either party by the giving of notice to the other.

North American Pump Corp. v. Clay Equipment Corp., 199 S.W.2d 888, 894 (N.D. 1972). *See also* ***Myra Foundation v. L.A. Harvey***, 100 N.W.2d 435 (N.D. 1960) (Syllabus ¶1). By statute North Dakota has adopted the same rule for the employment relationships. N.D.C.C. § 34-03-01. This is also the general rule for insurance agency agreements. 13 Holmes, *Holmes' Appleman on Insurance* 2d § 99.2 (1999).

Olander and State Farm expressly agreed that the Agent's Agreement contained their entire agreement. Their contract stated:

> E. This Agreement constitutes the sole and entire Agreement between the parties hereto, and no change, alteration, or modification of the terms of this Agreement may be made except by

---

[1]The case clearly turns on interpretation of the law of North Dakota and prediction of how that State's Supreme Court would resolve the legal issues presented. Appellees would respectfully point out to the Court that on rehearing it would be open to this Court to seek the guidance of the Supreme Court of North Dakota on these state law issues. *See* Rule 47, N.D.R.App.P.

> agreements in writing signed by an authorized representative of the Companies and accepted by you.

Appellees' Addendum 9. Therefore the rules announced in cases such as ***Schue v. Jacoby***, 162 N.W.2d 377 (N.D. 1968); ***Putnam v. Dickinson***, 142 N.W.2d 111 (N.D. 1966) and ***Jorgensen v. Crow***, 466 N.W.2d 120 (1991) are inapposite to construction of this writing.[2] In those cases the writing was not the complete agreement; indeed, in ***Jorgensen***, the parties agreed that the agreement was partially oral and partially written.

Olander's agreement was exactly the opposite: He expressly agreed the writing was the entire agreement.[3] Because the agreement was integrated, the relevant law does *not* involve partial written agreements, but the Parol Evidence Rule and N.D.C.C. §§ 9-07-02, 9-07-04 which provide that where the parties have reduced their agreement to writing, the writing must be used to determine their intent:

> § 9-07-02. The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity.

---

[2] For example, as the Court discusses in its Opinion (5-6), ***Schue*** recognizes that in some circumstances there may be proof of separate oral or written agreements on which the contract is silent. As discussed in the text, these parties made precisely the opposite agreement. That fact was entirely overlooked and should be respected.

[3] Also overlooked by the Court is the fact that, when it entered into the Agent's Agreement with Olander, State Farm relied on his acceptance of the "entire agreement" language; thus, Olander is estopped to change his position now and assert that the writing does not represent the entire agreement.

***

> § 9-07-04. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this chapter.

Concerning the Parol Evidence Rule, ***see Des Lacs Valley Land Corp. v. Herzig***, 621 N.W.2d 860, 862 (N.D. 2001):

> In *Gajewski*, 221 N.W.2d at 627, we concluded oral testimony was incompetent and inadmissible (1) to vary or contradict an executed and delivered quitclaim deed; (2) to prove the deed was security for repayment of a loan; and (3) to nullify the grant contained in the deed. We said:
>
> > The parol evidence rule has been variously defined and has been best stated as follows:
> >
> > """Where parties, *without any fraud or mistake*, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but *the only*, evidence of their agreement:' ... 'all preliminary negotiations, conversations, and verbal agreements are merged in and superseded by the subsequent written contract ... and "*unless fraud, accident, or mistake be*

> *averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence."'"'" Associated Hardware Supply Co. v. Big Wheel Distributing Company*, 355 F.2d 114, 119 (3d Cir. 1965), 17 A.L.R.3d 998. (emphasis added)

Silence as to cause does not render the Agreement ambiguous. See ***Yon v. Great Western Dev. Corp.***, 340 N.W.2d 43, 46 (1983) (silence of contract for deed concerning remedies for default did not render contract ambiguous and make parol evidence admissible: "The fact that the default provision is silent as to remedies other than cancellation does not suggest that the contract is in this regard ambiguous.").

The Court overlooked that and ***Wadeson v. American Family Mutual Ins. Co.***, 343 N.W. 367 (N.D. 1984) where plaintiff claimed his insurance agent's agreement could only be terminated for cause. As discussed below, he placed principle reliance on assurances of a long-term career. The Court held that the agreement was terminable at will, noting that the agreement provided (much like appellees') that it "may be terminated by any party as to its interest by giving written notice to the other" and that any "alteration or modification of its terms must be made by an agreement in writing signed," that language *supported* termination at will. The Court attached no significance to the silence concerning cause.

Under N.D.C.C. §§ 9-07-02, -04 North Dakota law presumes that, had these parties made any agreement in 1981 concerning cause as a requirement for termination, that would have been reflected in the writing they agreed was complete.

Thus, the fact that cause is not mentioned leads to only one conclusion: The parties did not make an agreement concerning cause. Opening the door now, some 21 years later, to the *addition* of a requirement of cause permits addition of a term which directly contradicts the writing the parties stipulated was their entire agreement. As the North Dakota Supreme Court's very recent formulation of the Parol Evidence rule in ***Des Lacs*** (quoted immediately above) makes clear, the Agent's Agreement's "*terms cannot be added to nor subtracted from by parol evidence*"; yet, that is exactly what this ruling would give Olander the opportunity to do.[4] The Court overlooks all of this as well as the fact that Olander admitted that no one from State Farm made representations to him concerning how or when the Agreement could be terminated. Jt. App. 189-90.

In support of the conclusion that other provisions of the Agreement render it ambiguous on the issue of whether cause is required for termination, the Court points to only two provisions. Those are Section III, paragraph B, which entitles[5] the agent to seek to a review and the next to last paragraph of the Preamble which expresses the expectation a mutually satisfactorily relationship will be created and maintained.

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[4] Agents are compensated by commission under the Agreement. Following the logic of the Opinion, an agent dissatisfied with his or her income could claim that, in addition to commission, appellees agreed to a guarantee of several thousand dollars a month income (so the relationship would be "satisfactory" per the Preamble) and point to silence of the Agreement as evidence of ambiguity on the point. That misapprehends North Dakota law. ***See Des Lacs, supra.***

[5] The Court also overlooks the fact that the Agreement uses similar language ("you are entitled") to grant the agent the right to review as it uses to grant the parties the right to terminate in III.A ("you ... have the right"). Yet the Court inexplicably treats them differently, regarding III.B as the grant of a *right* of review and III.A as a *notice* provision (Op. 5).

Neither provision mentions cause. As the decided cases show, neither lends any support to the proposition that cause is required to terminate the Agreement. Because Olander did not brief the argument, appellees did not address the issues directly, and it is thus understandable the cases which follow were overlooked.

The Review Process.[6] The review is not a search for cause. Cause is not in the Agreement language (Appellees' Add. 5-6), nor in the description of the process. Jt. App. 719. The President has sole discretion to decide whether to uphold termination.

Inclusion of a review process such as State Farm's does not render an insurance agency agreement ambiguous or imply a possible cause requirement. Just last year, in ***Kaldi v. Farmers Insurance Exchange***, 21 P.3d 16 (Nev. 2001) (cited in the dissent), plaintiff argued that Farmers' inclusion of a review process implied that cause was required to terminate. The Supreme Court of Nevada disagreed:

> While provision "D" [the review provision] unambiguously provides for a review of the Agent's termination, it does not indicate that the review is to establish the presence or absence of good cause. It merely provides a forum for arguing that the decision to end the agency

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[6] The Court also overlooks the fact that by failing to avail himself of the review process, Olander failed to exhaust the remedies available to him and this contract claim fails for that reason as well. ***Cooke v. University of North Dakota***, 603 N.W.2d 504 (N.D. 1999); ***Thompson v. Peterson,*** 564 N.W.2d 856, 861 (N.D. 1996). Olander did receive the termination pay specified by the Agreement. Also, by §§I.D. and E. of the Agreement, State Farm owned the business records, accounts and other items it removed after termination. Thus, the Court errs when it refers to those as "Olander's". Slip Op. 2.

> relationship should be reconsidered ... ***Provision "D" cannot be reasonably read to require Farmers to establish good cause before terminating the Agreement.***

21 P.3d at 20-21 (emphasis added). Thus, the Court's reliance on Kaldi as *supporting* ambiguity (Slip Op. at 7) completely misapprehends the holding there. The Nevada Court went on to explain the purpose of the review:

> The review board gives the agent the opportunity to assert that it is not in the best interest of Farmers to sever the agency relationship. It also gives the agent, in appropriate circumstances, a forum in which to argue that the termination was the product of bias or prejudice on the part of the person who made the initial decision to terminate the relationship. That is, the termination was not made to further the interests of Farmers, but the interests of the executive who made the decision. ***Thus, even without a requirement of cause, the review board serves a viable purpose under the contract.***

Similar provisions appear in many kinds of contracts. All of those in this Circuit may now be ambiguous or require cause for termination.

Also, as pointed out in Apellees' Brief, ***Mooney v. State Farm Insurance Companies***, 344 F.Supp. 697 (D.N.H. 1972) rejected this notion with reference to the review process included in Olander's contract:

> The review hearing provision does not change the termination clause, nor does it render that clause ambiguous. Its purpose is to benefit

> defendant by providing review of lower management decisions to terminate and reversal where those decisions are based on poor judgment.
>
> ***
>
> There is no mention of "due cause" in the contract, but plaintiff seeks to overcome this by reading into the review provision an unstated requirement that due cause must be found before the contract can be terminated. This not only strains credulity, *but flies in the face of common sense and accepted contract law.* Surely the company could not require the plaintiff to continue the agency contrary to the plaintiff's desire to terminate.

344 F.Supp. at 699-700 (emphasis added). The Court overlooked the ***Mooney*** case.

The Preamble. The Court overlooked the fact that the Supreme Court of North Dakota has expressly held that language such as that in the Preamble does not under North Dakota law imply that cause is necessary for termination. In ***Wadeson v. American Family Mutual Ins. Co.***, 343 N.W. 367 (N.D. 1984), also an insurance agent case, plaintiff pointed out that defendants' recruiting materials represented that a position with defendant was a "lifetime opportunity" and a "permanent and stable business" opportunity. He argued, as Olander did at oral argument, that those representations implied that cause was necessary for termination. The Supreme Court of North Dakota dismissed that argument:

> We do not read such statements used in recruiting new agents to be promises either of

> permanent employment *or that one will only be discharged for good cause.*

Id. at 371 (emphasis added).[7]

The Agreement is complete and unambiguous. The decision of the Court would permit plaintiff to use parol evidence to contradict the terms the parties chose, contrary to the strong statutory and case law of the forum state.

D. ARGUMENT FOR REHEARING EN BANC

The basic question is whether an independent contractor insurance agent's agreement was terminable at will by the insurers after the agent was involved and charged in the violent death of his neighbor in an altercation on a rural road.

1. The decision of the panel is contrary to decisions of this Court.

In ***Crowell v. Campbell Soup Co.***, 264 F.3d. 765, 761 (8th Cir. 2001) this Court read almost identical language to permit termination at will when governed by similar law. There, the agreement provided that:

> either party may elect to terminate this Agreement by written notice received by the other party at any time that no flock is placed or scheduled to be placed with GROWER.

---

[7] Although the recitations in the Preamble are part of the Agreement, they do not have the dignity of the provisions of the actual agreement and are not binding unless expressly incorporated into the remainder of the Agreement. ***Olympic Chevrolet, Inc. v. General Motors Corp.***, 959 F.Supp. 918, 92-23 (N.D. Ill. 1997). Olander's Agent's Agreement does not incorporate them.

Plaintiffs argued that casue was required based on oral discussions. As did both the Magistrate and District Judge here, the Disrtict Court in ***Crowell*** held that cause was not required. This Court affirmed.

In Martin v. Equitable Life Assurance Society, 553 F.2d 573 (8th Cir. 1977), the District Court found the insurance agent's agreement ambiguous and this Court reversed. This Court held that even though there was language concerning termination for specific causes, that did not render the termination at will cause ambiguous. Thus, it rejected the exact mode of analysis employed by the panel in this case when the panel found ambiguity based upon other provisions.

2. The decision of this Court raises matters of exceptional general importance.

a. Appellees have contract with hundreds of agents throughout the Circuit, all of which have language concerning termination similar to that at issue in this appeal. The parties need stability and predictability in those contractual relationships. That is a fundamental aim of contract law. The prior reported decisions uniformly hold that the Agreement is unambiguous and permits termination at will by either party. ***Mooney v. State Farm Insurance Companies***, 344 F.Supp. 697 (D.N.H. 1972); ***Melnick v. State Farm Mutual Automobile Insurance Co.***, 749 P.2d 1105 (N.M. 1988), *cert denied*, 499 U.S. 822, 109 S.Ct. 67, 102 L.Ed2d 44 (1988); ***Vitauskas v. State Farm Mutual Automobile Insurance Co.***, 509 N.E.2d 1385 (Ill. App. 1987). *See* ***Kaldi v. Farmers Insurance Exchange***, 21 P.3d 16 (Nev. 2001); ***Patillo v. Equitable Life Assurance Soc'y of the United States***, 502 N.W.2d 696, 699 (Mich. App. 1993); ***James H. Washington Ins. Agency v. Nationwide Mut. Ins. Co.***, 643 N.E.2d 143, 147 (Ohio App. 1993). North Dakota law, which governs here, has as much respect for the integrity of the parties written, entire agreement

as the jurisdictions in which the earlier cases were decided. This Opinion introduces untold uncertainty and instability into those relationships.

b. North Dakota rigorously enforces its Parol Evidence rule and associated statutes where, as here, the writing is the complete agreement. ***See Des Lacs Valley Land Corp. v. Hezig***, 621 N.W.2d 860, 862 (N.D. 2001); N.D.CC.§§ 9-07-02, -04. That State (whose law governs) does not permit parol evidence to contradict the terms of such agreement; this Court is obligated to follow that lead. Instead, this decision will cause great uncertainly about the vitality in this Court of those North Dakota rules.[8] Absent a hearing by the entire Court and/or a reference to the Supreme Court of North Dakota under Rule 47, N.D.R.App.P., the panel opinion should not be permitted to cause such uncertainty.

c. Many types of employment and service agreements contain review provisions similar to the Agent's Agreement. This opinion suggests that all such contracts in this Circuit are ambiguous or may require cause. That is unprecedented.

With all due respect, the decision is not a correct application of North Dakota law and is not a correct construction of the contract. It will cause much unnecessary expenditure of District Court time in this case and confusion in other cases. Justice and efficient judicial administration require that it be corrected now by the panel or the Court En Banc. For the above and forgoing reasons appellees respectfully urge that the case be reheard by the panel and/or en banc.

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[8] This decision will call into question the ability to sustain in this Court any parol evidence or termination at will argument.

Respectfully Submitted.

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APPENDIX L

Case No. 01-1947

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIAN OLANDER,

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
OF NORTH DAKOTA, SOUTHWESTERN DIVISION

Honorable Rodney S. Webb, Judge

RESPONSE TO PETITION FOR PANEL REHEARING

RESPONSE TO PETITION FOR REHEARING EN BANC

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February 20, 2002

I. THE PETITION DOES NOT PRESENT A BASIS FOR A PANEL REHEARING

Following basic North Dakota principles governing the construction of contracts, the Court examined the contract *as a whole* to determine whether rational arguments could be made for different positions on the question whether State Farm could exercise the termination on notice provision without just cause. See, e.g., Kaler v. Kraemer, 603 N.W.2d 698, 702 (N.D. 1999) ("a contract is ambiguous when rational arguments can be made for different positions about its meaning") and Nat'l Bank of Harvey v. Int'l Harvester Co., 421 N.W.2d 789, 802 (N.D. 1988) (the intention of the parties "must be gathered from the entire instrument, *not from isolated clauses*, and every clause, sentence, and provision should be given effect *consistent with the main purpose of the contract*")(emphasis added).

The Court noted that the contract was silent on the question whether State Farm could exercise the termination provision without just cause (thereby creating the question), but the Court did not reach its determination that rational arguments could be made for different positions on that basis, alone: "[W]e have no disagreement with the dissent's explanation of the general rule that silence alone does not create an ambiguity." (Decision, page 5.) Following the North Dakota methodology, the Court went on to examine the rest of the contract so as to "give effect to every part" and use "[e]ach clause to help interpret" the termination on notice provision. (See N.D.C.C. § 9-07-06.)

First the Court examined Paragraph B of Section III of the contract, which provides:

> In the event we terminate this Agreement, you are entitled upon request to a review in

> accordance with the termination review procedures approved by the Board of Directors of the Companies, as amended from time to time.

In moving for summary judgment, State Farm did not provide the Court with the "termination review procedures" which are incorporated into the paragraph by reference, and the contract does not otherwise explain the purpose of the termination review or the manner in which the termination review is to be conducted. The Court concluded from the incomplete evidence before it: "[w]hile by no means foreclosing other interpretations, one rational explanation for the existence of the review procedure is to ensure that any termination was made for good cause, and not capriciously." (Decision, page 7.)

Taking issue with this conclusion, the dissent argued that other cases construing other review procedures had concluded that review procedures were not a search for cause. (Dissent, page 10.) In its Petition for Panel Rehearing, State Farm adds one of its own cases, the Mooney decision, a 1972 case from the District of New Hampshire. Those cases do not dictate a conclusion that, in the present case, the Court is in error in seeing a rational possibility that the termination review procedure in *this* case, where the *currently* applicable principles and procedures, though part of the contract, are not yet before the Court, could be a search for cause.

The Court's determination that a rational argument exists for the interpretation that State Farm may not terminate the contract without just cause draws further support from Sections I(D), I(E), I(G), III(D), and III(E) of the contract. Section I(E) required Olander to invest heavily over the years to develop his own business, bearing all the capital cost and expense burden of establishing, operating, and expanding the business. Section I(G) prohibited Olander from establishing a

business relationship with any other insurance company. Section I(D) identified all of Olander's business good will (i.e., every bit of information he had about his clients) and operating information as the exclusive property of State Farm. Section III(D) required Olander to turn over all of his business goodwill and operating information to State Farm within ten days after his termination. Section III(E) required Olander to sever his entire business relationship with all of his clients for one year after his termination.

The design and effect of these provisions was to allow State Farm, upon termination, to appropriate the entire business that Olander had developed over many years and to sever Olander's relationship with his entire client base. Under these circumstances, it would have been highly irrational for Olander (or any other State Farm agent) to agree that his contract could be terminated at will, without any cause whatsoever.

These provisions apply, regardless of which party terminates the contract. That is why State Farm's arguments directed to the "mutuality" of the termination right are irrelevant. In every case, termination of the contract means a major windfall for State Farm and forfeiture of an entire business by the agent. Under these circumstances, the agents "right" to terminate without cause and without a termination review is illusory, without meaning.

This feature of the State Farm contract, which was discussed at the oral argument though not emphasized in the Decision, further supports the Court's conclusion that a rational argument can be made that the contract is not terminable without cause.

This post-termination handling of the business is the critical distinction between this case and the Kaldi v. Farmers Insurance case from the state of Nevada, which the Petition for

Rehearing cites. Unlike State Farm, Farmers does not have a contract which compels the agent to forfeit his entire business upon termination. If Farmers terminates an agent's contract, the contract requires Farmers to either (a) purchase the business by paying the "Contract Value" of the business to the agent or his heirs or (b) allow the agent to nominate a successor who will operate the business for him after the termination. Kaldi v. Farmers Insurance Exchange, 21 P.3d 16, 18 (Nev. 2001). With those protections, an agent could rationally agree to a contract terminable at will.

The Court draws further support for its determination from a statement of purpose in the Preamble:

> The Companies and the Agent expect that by entering into this Agreement, and *by the full and faithful observance and performance of the obligations and responsibilities herein set forth, a mutually satisfactory relationship will be* established and *maintained.* (Emphasis in the Decision.)

(Decision, page 7.) This statement of purpose suggests that State Farm will not terminate the contract so long as Olander performs his contract obligations fully and faithfully. By interpreting the termination provision in light of this statement of purpose, the Court is continuing to apply North Dakota contract construction principles. See, e.g., Nat'l Bank of Harvey v. Int'l Harvester Co., supra, at 802: "every clause, sentence, and provision should be given effect *consistent with the main purpose* of the contract." (Emphasis added.)

The Petition for Rehearing does not provide any basis for disturbing this straightforward application of North Dakota law. On pages 3-4, the Petition cites several State Farm cases from other jurisdictions, which did not address the salient

features of the contract that have been identified and addressed in this case. The petition refers to those cases as "well reasoned" and suggests that the Court overlooked them. These cases were not overlooked. They were cited in State Farm's brief and in the dissent. (They have also been cited regularly in all of the cases on the West Coast that are being decided against State Farm.) The problem with these cases is not that they have been overlooked but that their reasoning is not persuasive.

There is no basis for concluding that the handful of cases which have been decided in favor of State Farm have established nationwide "settled contract expectations." As the Court knows, there are also several cases which have been decided against State Farm on this issue, and there is no evidence to suggest that the nationwide group of agents prefers, or is resigned to, State Farm's view of the contract.

On page 4, the Petition assumes, incorrectly, that the State Farm contract is a narrow "personal services" agreement and then cites two North Dakota cases for the proposition that personal services and employment agreements of indefinite duration are terminable at will by either party. These decisions do not affect the Court's determination. Olander's contract was not a mere "personal services" or employment agreement. Olander was an independent contractor developing a sizeable business with several employees, which produced a product -- insurance applications -- for State Farm. The policy reasons which underly the general principle that State Farm is citing (e.g., one should not be compelled to work against his will, an employer should not be forced to interact with an employee whom he dislikes) do not apply to this contract between two business entities.

On pages 4-8, the Petition argues that the contract is a fully integrated contract so that parol evidence may not be used to try to establish a separate agreement outside the writing.

These arguments are not on the point. Everyone agrees that this is a fully integrated contract and that there is no other agreement. What is at issue here is the *interpretation* of the integrated contract and the methodology which is being used to *interpret* it. No one is trying to "add or subtract" terms via parol evidence, as the Petition attempts to suggest on page 8.

II. THE PETITION DOES NOT PRESENT A BASIS FOR A REHEARING EN BANC

The Decision of the Court -- a fact-intensive analysis of one company's unique contract using basic North Dakota contract principals -- is not contrary to the decision in either Crowell v. Campbell Soup Co. or Martin v. Equitable Life Assurance Society. In Crowell the Court, analyzing a contract under Minnesota law, held that "alleged oral promises" which "plainly contradicted the terms of the written contract" could not be used to vary a termination clause in the contract. Crowell v. Campbell Soup Co., 264 F.3d 756, 762 (8th Cir. 2001). In Martin, the Court held that a clause delineating certain specific actions which would likely cause a termination could not be used to vary a separate clause allowing termination without cause. Martin v. Equitable Life Assurance Society, 553 F.2d 573, 575 (8th Cir. 1977). Neither of those cases presents a fact pattern analogous to this case.

On page 13 of the Petition, State Farm suggests that this Decision raises matters of "exceptional general importance," in that hundreds of agents in the Circuit have similar contracts and need "stability and predictability" in those contractual relationships. What State Farm is actually saying is that one party -- State Farm -- wants to exercise complete control over these hundreds of agents and does not want this Court to interfere with that control. It is highly doubtful that the hundreds of agents, if asked, would express a desire for the

"stability and predictability" of knowing that State Farm could terminate them at will and confiscate their entire businesses anytime it chose.

The comments on page 14 of the Petition to the effect that this Decision threatens the "integrity" and the "vitality" of North Dakota's contract principles is completely off the mark. In reaching its Decision, this Court assiduously followed fundamental North Dakota contract principles, construing the agreement to determine whether rational arguments could be made for different positions about its meaning (Kaler v. Kraemer) by reading the agreement as a whole (N.D.C.C. § 9-07-06), giving effect to all parts (Id.), using each clause to help interpret others (Id.), and giving each provision an effect consistent with the main purpose of the contract (Nat'l Bank of Harvey v. Int'l Harvester Co.).

CONCLUSION

This Decision is in complete accord with North Dakota contract construction principles and with the line of decision of this circuit. There is no basis for a panel rehearing or a rehearing en banc.

Dated: February 20, 2002

/s/

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